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# **Dancing Around Employment At-Will: Can Fraud Provide Plaintiffs a Way to Hold Their Employers Liable?**

*O'Neal v. Stifel, Nicolaus & Co.*<sup>1</sup>

## **I. INTRODUCTION**

For over a century, the employment at-will doctrine has formed an important part of American jurisprudence. The doctrine, and what some see as its potentially harsh results, have received strong criticism.<sup>2</sup> In some states, courts have used their ability to modify the common law to alter the employment at-will doctrine by creating exceptions based on public policy, the use of employee handbooks, and face-to-face statements by managers that imply a promise of employment.<sup>3</sup> The Missouri Court of Appeals for the Eastern District of Missouri recently gave discharged employees a new way to avoid the almost absolute bar of the employment at-will doctrine.<sup>4</sup> Based on the court's decision in *O'Neal v. Stifel, Nicolaus & Co.*, plaintiffs may now be able to dance around the barrier of the employment at-will doctrine if they are able to demonstrate fraud. However, this decision, which provides plaintiffs with a new weapon in wrongful termination suits, may be in conflict with previous Missouri law.

## **II. FACTS AND HOLDING**

Charles O'Neal and Stifel, Nicolaus, & Company ("Stifel"), a securities brokerage firm, were involved in negotiations about the possibility of O'Neal coming to work for Stifel.<sup>5</sup> Stifel proposed that O'Neal leave his current employment to become the branch manager and assistant vice-president of one

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1. 996 S.W.2d 700 (Mo. Ct. App. 1999).

2. See Ross P. Andrews & Richard A. Moroko, *Employment-at-Will in New York Remains Essentially Unchanged After a Century of Refinements*, N.Y. ST. B.J., Sept.-Oct. 1999, at 8.

3. See generally *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Ct. App. 1981) (holding that statements made by company president that "if you are loyal to [See's Candies] and do a good job, your future is secure" could give rise to an action based on contract); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985) (recognizing an exception to the employment at-will doctrine based on public policy when employee is terminated for reporting a violation of law or government regulations); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985) (holding that express statements in employee handbooks could take the employment relationship outside the bounds of the employment at-will doctrine).

4. *O'Neal*, 996 S.W.2d at 703.

5. *Id.* at 701.

of Stifel's brokerage offices.<sup>6</sup> According to O'Neal, one of Stifel's employees, Michael Murphy, told him that Stifel was going to employ him.<sup>7</sup> The brokerage firm also sent O'Neal a letter offering him specific terms of employment.<sup>8</sup> The letter did not, however, give O'Neal a definite amount of time for which he would be employed and it did not limit the reasons that Stifel could discharge him.<sup>9</sup> O'Neal responded by sending Stifel a letter clarifying the terms of their agreement and even adding some new terms.<sup>10</sup>

In preparation for employment with Stifel, O'Neal recruited a sales aid to assist him and began the process of ending his previous employment.<sup>11</sup> O'Neal even informed his clients of his new position and began the process of transferring his existing client base over to Stifel.<sup>12</sup> One week before O'Neal was to begin his new job, Stifel informed him that it would be unable to employ him under the terms of their previous agreement.<sup>13</sup>

O'Neal filed suit in St. Louis City Circuit Court, alleging two separate counts, both growing out of Stifel's failure to employ him.<sup>14</sup> First, O'Neal sought damages for breach of contract.<sup>15</sup> Specifically, O'Neal claimed that Stifel's failure to employ him under the terms of their earlier agreement constituted a breach of that agreement.<sup>16</sup> Count II of the petition alleged that Stifel had committed two different types of fraud against O'Neal.<sup>17</sup> First, O'Neal claimed that Stifel had fraudulently induced him to accept a position as a branch manager and an assistant vice-president with the company.<sup>18</sup> In making his claim, O'Neal alleged that Stifel caused Murphy to make material misrepresentations about Stifel's employment offer and that both the company and Murphy knew that Murphy's representations were false.<sup>19</sup> O'Neal claimed that Stifel intended for him to rely, to his detriment, on Murphy's

6. *Id.*

7. *Id.* at 703.

8. *Id.* at 701.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 701, 703.

13. *Id.* at 701.

14. *Id.* at 700-01.

15. *Id.* at 701. O'Neal's breach of contract claim received little comment in the court's opinion because O'Neal did not appeal the trial court's grant of summary judgment against him on count I. *Id.*

16. *Id.* The court seems to imply that there was an agreement between the parties about some of the terms of O'Neal's employment. Because count I was not before the court on appeal, it never expressly addressed whether the letters between Stifel and O'Neal constituted a contract.

17. *Id.*

18. *Id.*

19. *Id.* at 703.

representations.<sup>20</sup> Second, O'Neal claimed that Stifel falsely represented the terms of his proposed employment, "upon which he detrimentally relied, causing him to engage in a series of actions to terminate his then present employment; to commence the transfer of his existing client base; and to hire a support staff to assist him at his new position with Stifel."<sup>21</sup>

Stifel filed a motion for summary judgment against both of O'Neal's claims.<sup>22</sup> Stifel claimed that count I of O'Neal's claim was barred as a matter of law by the employment at-will doctrine and that count II failed because it was a claim for fraud that arose out of a contract claim.<sup>23</sup> Because the contract claim was precluded by the employment at-will doctrine,<sup>24</sup> Stifel argued that the fraud claim was similarly precluded by the doctrine.<sup>25</sup> The trial judge granted Stifel's summary judgment motion as to count I.<sup>26</sup> As to count II, however, the trial court concluded that Stifel had failed to include any references to undisputed facts as required by the *Missouri Rules of Civil Procedure*.<sup>27</sup> The judge, on his own motion, turned Stifel's summary judgment motion into a motion to dismiss for failure to state a claim.<sup>28</sup> The trial judge reviewed count II and dismissed it because "the alleged misrepresentations [were] the same statements which form[ed] the basis of O'Neal's breach of contract claim."<sup>29</sup>

O'Neal appealed the trial court's ruling on count II of his petition to the Missouri Court of Appeals for the Eastern District of Missouri.<sup>30</sup> The court

20. *Id.*

21. *Id.* at 701.

22. *Id.*

23. *Id.*

24. The employment at-will doctrine:

[C]reates a presumption that, absent an agreement establishing a fixed duration, an employee is retained at-will. If the employee is unable to rebut that presumption by reference to a contractual limitation (such as a collective bargaining agreement) or statutory restriction (such as equal employment opportunity laws), he or she may be terminated 'at any time for any reason or even for no reason.'

Andrews & Moroko, *supra* note 2, at 8. Thus, an at-will employee cannot maintain an action for breach of contract based solely on her termination. Unless the employment agreement specifically states otherwise, at-will employees can be fired at anytime after they have accepted a job. Andrews & Moroko, *supra* note 2, at 8. Because O'Neal was unable to demonstrate that his employment relationship with Stifel was anything other than employment at-will, he could not sue Stifel under contract law for terminating him because Stifel had an unqualified right to do so. *Cf. O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 702 (Mo. Ct. App. 1999).

25. *O'Neal*, 996 S.W.2d at 701.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 702.

overturned the trial judge's ruling and remanded the case for further proceedings.<sup>31</sup> In reaching its decision, the court held that O'Neal's fraud claims arose out of the negotiations behind the contract, not the contract itself, and therefore were not barred by the employment at-will doctrine.<sup>32</sup>

### III. LEGAL BACKGROUND

Employment is one of the most fundamental aspects of any American's life. For many, a job is more than just a source of income—it is a way of life, and for many, their sole source of financial security.<sup>33</sup> Over the past forty years, Americans have become increasingly dependent on working to provide their entire livelihood.<sup>34</sup> The ability to provide food, shelter, education, medical care, and retirement income are all deeply intertwined with employment in the labor market.<sup>35</sup> Because of the basic importance to an individual's welfare in keeping a job, numerous industrialized nations have adopted laws protecting employment security.<sup>36</sup> Western European nations such as France, Germany, and Great Britain all have laws preventing "unjust" employee terminations.<sup>37</sup>

The United States follows a different path. In almost every American jurisdiction, the employment at-will doctrine is the basic foundation on which the entire corpus of employment law is built.<sup>38</sup> Missouri is no exception to the rule.<sup>39</sup> The employment at-will doctrine states that "when an employee is hired for an indefinite period of time, the employee or the employer may terminate the relationship without cause at any time."<sup>40</sup> In Missouri, absent a contrary

31. *Id.* at 704. Chief Judge Dowd wrote the opinion for a unanimous panel. The panel also included Judge Karohl and Senior Judge Blackmar, a former Missouri Supreme Court Judge.

32. *Id.* at 702-03.

33. See Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 196 (1983).

34. See *id.*

35. See *id.*

36. See Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 862 (1983).

37. *Id.*

38. *Id.* Only South Dakota does not adhere to the employment at-will doctrine. *Id.* The employment relationship in South Dakota is governed by state statute: "[A] 'servant is presumed to be hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year.'" *Id.* (quoting S.D. CODIFIED LAWS § 60-1-3 (Michie 1978)). "The employer has the burden of proving grounds for termination, such as habitual neglect or willful breach of duty, or continued incapacity." *Id.* (citing *Goodwyn v. Sencore, Inc.*, 389 F. Supp. 824, 829 (D.S.D. 1975)).

39. See *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985) (upholding the continuing validity of the employment at-will doctrine in Missouri).

40. Heinsz, *supra* note 36, at 855-56.

statutory provision or one of a limited number of exceptions, the doctrine prevents discharged employees from suing their former employers for wrongful termination, breach of contract, prima facie tort, or any other claim arising from the existence of an employment agreement.<sup>41</sup> The doctrine also prevents a cause of action for breach of a promise to hire someone as an at-will employee.<sup>42</sup>

The employment at-will doctrine is a relatively new phenomenon in American jurisprudence.<sup>43</sup> The doctrine arose in the middle of the nineteenth century, just before the dawn of the Industrial Revolution.<sup>44</sup> Prior to that time, most American jurisdictions followed the classic English rule "that unless expressed to the contrary, a term of employment was presumed to be for one year."<sup>45</sup> However, a few states followed the rule that the period of payment determined the duration of employment.<sup>46</sup>

Scholars trace the beginning of the dominance of the employment at-will doctrine to Horace Wood's 1877 treatise on master-servant law.<sup>47</sup> Wood's treatise included a short statement that a hiring for an indefinite term is a hiring at-will and placed the burden of proving otherwise on the discharged servant.<sup>48</sup>

41. See *Dake*, S.W.2d at 192-93 (indicating discharged employees cannot maintain either an action for wrongful discharge or prima facie tort).

42. See *Rosatone v. GTE Sprint Communications*, 761 S.W.2d 670, 674 (Mo. Ct. App. 1988).

43. See *Heinsz*, *supra* note 36, at 858.

44. See *Heinsz*, *supra* note 36, at 859.

45. *Heinsz*, *supra* note 36, at 859. In the fourteenth and fifteenth centuries, when the rule originally developed, labor was a scarce commodity and a master could not dismiss a servant without "reasonable cause." *Heinsz*, *supra* note 36, at 859.

46. See *Heinsz*, *supra* note 36, at 859. At least Arkansas and South Carolina followed the rule that the period of payment determined the duration of employment. See *Heinsz*, *supra* note 36, at 859. The Supreme Court of South Carolina adopted this rule in *Pinckney v. Talmage*, 10 S.E. 1083, 1084 (S.C. 1890). In *Pinckney*, a clerk sued his ex-employer for breach of contract, alleging that he was due salary for the entire year even though he had been fired only one month into the year. *Id.* Because the clerk was paid monthly, the court held that his employment contract, which lacked a stated duration, only ran for a month at a time. *Id.* Arkansas used a similar rule until well into the twentieth century. See *Moline Lumber Co. v. Harrison*, 194 S.W. 25, 26 (Ark. 1917). The Arkansas Supreme Court succinctly explained its approach in the following way:

[W]here a unit of time is described in mentioning the compensation without any other reference to time, it is fairly inferable that the parties intended to contract for that period of time. Of course, the terms thus specified are to some extent indefinite, and may be controlled by the circumstances of any particular case, but in the absence of countervailing circumstances we think that a trial court or jury is warranted in construing the terms of the contract to be for a hiring for the unit of time specified in fixing the wages or salary.

*Id.*

47. See *Krauskopf*, *supra* note 33, at 192; see also HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1886).

48. See *WOOD*, *supra* note 47, § 136, at 283. Wood's rationale has undergone

After its publication, the employment at-will doctrine spread quickly and soon became the law in a majority of states.<sup>49</sup> One possible reason for the doctrine's rapid acceptance was the social and business environment in America during the late nineteenth century.<sup>50</sup> Professor Krauskopf explains:

The application of the at will doctrine did not seem harsh for a variety of reasons. An individual's employment relationship with any one employer was seldom of long term economic significance. The cultural frontier mentality and the burgeoning variety of commercial

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some significant criticism. More recent examinations argue that the six cases Wood relied on to support his statement do not back up his proposition. Professor Krauskopf explains:

Wood cited four American cases and two Scottish cases in support of his rule. . . . Wood's allocation of the burden of proof of a term (of employment) is consistent with two of the decisions holding that the jury was properly permitted to determine whether a term was agreed upon from the evidence of all the circumstances surrounding the contract. Wood's second sentence, however, that proof of wage rate for a period does not establish the term, is not supported by any of the six cases. Most significantly, not one of the cases supports the proposition that an indefinite hiring may be ended at will, in the sense of without justification. Wood's reference to proof of a term in the same sentence that he used the expression at will indicates that, by using at will, he meant only without a durational term.

Krauskopf, *supra* note 33, at 192 (citations omitted).

49. See Heinsz, *supra* note 36, at 859. Today, only South Dakota marches to the beat of a different drummer. *Id.* South Dakota's statutes provide that "[t]he length of time which an employer and employee adopt for the estimation of wages is relevant to a determination of the term of employment." S.D. CODIFIED LAWS § 60-1-3 (Michie 1998). While South Dakota's approach is different in theory from other states, whether any practical differences exist is open to debate. On its face, South Dakota's statute appears to make the employee's pay period determinative of the duration of her employment contract unless some other duration for the agreement is stated. In *Goodwyn v. Sencore, Inc.*, 389 F. Supp. 824, 828 (D.S.D. 1975), a federal district court with diversity jurisdiction over the parties interpreted the statute in exactly that manner. The *Goodwyn* court held that an employee who was hired at a yearly rate of \$15,000 had an employment contract that was intended by the parties to last one year. *Id.* The employee was awarded the unpaid balance of his yearly salary by the court. *Id.* at 830. South Dakota's own supreme court has not, however, ever interpreted the statute in this manner. It has only been faced with the implications of Section 60-1-3 on two occasions. See *Blote v. First Fed. Sav. & Loan Ass'n*, 422 N.W.2d 834 (S.D. 1988); *Ruple v. Weinaug*, 328 N.W.2d 857 (S.D. 1983). In both *Blote* and *Ruple*, the court generally acknowledged the presumption created by Section 60-1-3 and simultaneously recognized an exception to it. In *Blote*, an explicit statement in the Savings and Loan Association's by-laws made the employee an employee at-will; and in *Ruple*, a state statute authorizing a municipality to fire its finance officer at any time also overcame the presumption and created an at-will relationship. *Blote*, 422 N.W.2d at 837; *Ruple*, 328 N.W.2d at 858-59.

50. See Krauskopf, *supra* note 33, at 191; Heinsz, *supra* note 36, at 861-62.

enterprises led to an expectation of personal mobility and entrepreneurial instability. . . . Most important, . . . long-term economic security in the sense of provision for subsistence, food, shelter, medical care, disability protection and retirement or old-age 'insurance' was self-insured by the family institution, the basic personal protection unit of society.<sup>51</sup>

One of the first states to adopt the employment at-will doctrine was New York. In 1895, the New York Court of Appeals handed down *Martin v. New York Life Insurance Co.*<sup>52</sup> In *Martin*, the court "embraced the 'inflexible' rule that a 'general or indefinite hiring is prima facie a hiring at will.'" <sup>53</sup> Missouri's employment at-will doctrine is very similar to the one enunciated by the court in *Martin* with a few "modern" exceptions. According to the Missouri Supreme Court, employees who do not have a contract for a definite period of time are considered employees at-will.<sup>54</sup> An at-will employee can generally be discharged by an employer without fear of liability for wrongful discharge at any time, for any reason, or no reason at all.<sup>55</sup>

Missouri also embraced the employment at-will doctrine shortly after Wood's treatise was published. In 1883, in *Finger v. Koch & Schilling Brewing Co.*,<sup>56</sup> the St. Louis Court of Appeals stated that "[a]n indefinite hiring, at so much per day, per month, or per year, is a hiring at will, and may be terminated by either party at any time."<sup>57</sup> The court denied recovery of five hundred dollars to a brewer who had been terminated in the middle of the year.<sup>58</sup> The court held that the brewer could be discharged by his employer at any time because the employee's only evidence concerning the duration of his employment agreement was that the employer had agreed to let him work for the full year "[i]f you do your work well."<sup>59</sup> In announcing the employment at-will doctrine, the court did

51. Krauskopf, *supra* note 33, at 191.

52. 42 N.E. 416 (N.Y. 1895); see Andrews & Moroko, *supra* note 2, at 8.

53. *Id.* at 417.

54. See *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. 1981).

55. See *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985). There are, of course, some clearly recognized exceptions to this doctrine. Missouri courts have recognized a "public policy" exception to the employment at-will doctrine. See *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo. Ct. App. 1985). While it does not alter the fact that discharged employees cannot sue under a breach of contract theory, the exception allows discharged employees to bring an action for tort damages. Although the Missouri Supreme Court has yet to deal with this issue, the public policy exception was first recognized almost two decades ago by the Missouri Court of Appeals for the Western District of Missouri in *Boyle*.

56. 13 Mo. App. 310 (1883).

57. *Id.* at 311.

58. *Id.* at 313.

59. *Id.* at 312.



not rely on previous Missouri precedent or Wood's treatise.<sup>60</sup> Instead, the court relied on an opinion from the California Supreme Court, which had earlier embraced the employment at-will doctrine.<sup>61</sup>

Unlike some states, Missouri did not elect to use the employment at-will doctrine as a replacement for an earlier approach. Only two other Missouri cases prior to 1890 raise the same issues addressed in *Finger*. In 1880, in *Boogher v. Maryland Life Insurance Co.*,<sup>62</sup> the St. Louis Court of Appeals rejected the English rule that a hiring for an indefinite period implies a hiring for a year-long term.<sup>63</sup> And then in 1887, in *Evan v. St. Louis, Iron Mountain & Southern Railway Co.*,<sup>64</sup> the St. Louis Court of Appeals again wrestled with presumed duration of employment contracts. In *Evan*, the court relied on its decision in *Finger* and stated that using a monthly pay period did not take the parties to the agreement outside the bounds of the employment at-will doctrine.<sup>65</sup> Prior to 1880, Missouri courts apparently never faced the issue of the duration of an employment agreement when a specific time period was not stated. The state's approach to employment agreements was to treat them like ordinary contracts. Missouri's first and probably only "real" employment law case prior to the Civil War demonstrates that its courts primarily analyzed the employment relationship using general contract law principles.<sup>66</sup> In 1841, the court, for example, held that one party's breach could be excused if she was prevented from performing by the other party's actions.<sup>67</sup>

60. *Id.* at 311-13.

61. *Id.* at 311. Even though the court did not specifically embrace Wood's treatise, they were aware of it. The brewing company's lawyer, in his arguments to the court directly cited to Wood's treatise for the exact same proposition the court announced in its opinion using a California Supreme Court case as support. *Id.* The attorney also cited to *Posey v. Garth*, 7 Mo. 94 (1841), what appears to be the first exclusive "employment law" case ever decided in Missouri. *Id.* For a discussion of *Posey*, see *infra* note 66.

62. 8 Mo. App. 533 (1880).

63. *Id.* at 534. The court rejected the English rule because of "its origin in local customs" and its harsh "consequences which have made even English judges hesitate to enforce it." *Id.* What exactly the harsh consequences of the rule were and why they had to be especially heinous for even English judges to refuse to enforce it were left unstated by the court. *Id.*

64. 24 Mo. App. 114 (1887).

65. *Id.* at 117-18.

66. See *Posey*, 7 Mo. at 94. *Posey* is a rather disturbing case to have as Missouri's first employment law precedent. In *Posey*, a planter hired someone to work as his overseer for one year. *Id.* at 95. Just a few months into the contract, the overseer was fired for beating a slave to death with a whip and a handspike. *Id.* at 95-96. The overseer then sued, claiming he was fired without any just cause. *Id.* at 96. The Missouri Supreme Court held that the slave's "mere disobedience of orders" was not sufficient justification for the overseer's actions and held that the planter had both the right and duty to discharge him. *Id.* at 97.

67. *Id.*

The employment at-will doctrine does more than simply prevent a discharged employee from maintaining a suit predicated on wrongful termination or breach of contract. Missouri law also prevents discharged employees from successfully making any kind of tort claim out of their termination if the claim relies on the same facts that could be used for a breach of contract or wrongful discharge action but for the employment at-will doctrine. The Missouri Supreme Court first directly confronted this issue in *Dake v. Tuell*.<sup>68</sup>

In *Dake*, the court held that the plaintiffs could not “cloak their claims in the misty shroud of prima facie tort” to avoid the prohibitions of the employment at-will doctrine.<sup>69</sup> The court noted that the employment at-will doctrine is firmly rooted in Missouri case law and prohibits actions for wrongful discharge against a former employer absent a contract for a definite period or some specific statutory provision.<sup>70</sup> Allowing a plaintiff to maintain an action in prima facie tort using the same facts that would fail to give rise to a wrongful discharge claim would, according to the court, “render near impotent” the employment at-will doctrine.<sup>71</sup> The only way a discharged employee can hope to recover, absent a statutory provision on which to base her claim, is to set forth “the essential elements of a valid contract, and a discharge in violation thereof.”<sup>72</sup>

The *Dake* opinion, by its very terms, can be read as establishing “that there may be no action for wrongful termination in the absence of contract or statute” no matter what type of claim, including any tort claims, a party attempts to assert.<sup>73</sup> The Missouri Court of Appeals for the Eastern District of Missouri interpreted the *Dake* opinion and its progeny in this narrow manner. In *Hanrahan v. Nashua Corp.*,<sup>74</sup> the Eastern District faced a very similar situation

68. 687 S.W.2d 191 (Mo. 1985).

69. *Id.* at 192.

70. *Id.* at 192-93.

71. *Id.* at 193.

72. *Id.* (quoting *Maddock v. Lewis*, 386 S.W.2d 406, 409 (Mo.), *cert. denied*, 381 U.S. 929 (1965)).

73. *Id.* at 194 (Blackmar, J., concurring). This concern led Judge Blackmar to be the only concurrence to the court’s opinion. *Id.* Judge Blackmar read the majority’s opinion as going too far and foreclosing the possibility of future growth in the law. *Id.* He was concerned that the decision would foreclose the court from considering other tort claims that might arise out of an employment termination. *Id.* As an example, Judge Blackmar pointed to *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984), a case decided by the Eighth Circuit applying Arkansas law. In *Lucas*, the employee alleged that she had been discharged because she had refused to sleep with her foreman. *Id.* at 1202. Judge Blackmar disagreed with the majority’s holding in *Dake* to the extent that it would exclude such claims as the one presented in *Lucas*. *See Dake*, 687 S.W.2d at 193 (Blackmar, J., concurring). Serving as a Special Judge in the *O’Neal* case, Judge Blackmar was able to avoid a broad reading of the *Dake* holding and allow discharged employees to sue under the tort claim of fraud. *See generally* *O’Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700 (Mo. Ct. App. 1999).

74. 752 S.W.2d 878 (Mo. Ct. App. 1988).

to the one it faced eleven years later in *O'Neal*. The plaintiff in *Hanrahan* tried, among other things, to allege a claim of fraud against his former employer.<sup>75</sup> The court upheld the dismissal of the plaintiff's claims because his petition was "essentially one for wrongful discharge from employment under the umbrella of the theories of tortious interference of business expectancies and fraud."<sup>76</sup> The *Hanrahan* court further stated that "no matter what particular legal theory an employee asserts against the employer for a claim of wrongful discharge, whether it be for prima facie tort, implied contract, . . . fraud, tortious interference with business relations, outrageous conduct, or any other legal theory which may seek to allege such a claim," it is barred by the employment at-will doctrine.<sup>77</sup> The court noted that regardless of the ingenuity of a plaintiff's legal theory, the employment at-will doctrine prevents former employees from suing their employers for terminating them.<sup>78</sup>

In the same year the court decided *Hanrahan*, the Eastern District again dealt with the same issue, although under a slightly different guise. In *Rosatone v. GTE Sprint Communications*,<sup>79</sup> the plaintiff tried to avoid the bar of the employment at-will doctrine by alleging detrimental reliance.<sup>80</sup> The plaintiff, after significant negotiations, was offered a job by GTE and Sprint to work in their new joint venture.<sup>81</sup> The defendants offered the plaintiff this job even though they knew that he was already employed at the time by Citicorp.<sup>82</sup> Less than a month after the employment offer, Rosatone resigned from his job at Citicorp to take the position with the defendants.<sup>83</sup> Six days after his resignation, the defendants repudiated their employment contract with Rosatone and left him completely unemployed.<sup>84</sup> The court held that the employment at-will doctrine barred the plaintiff from any recovery.<sup>85</sup> The court stated that holding any other way would introduce absurd and anomalous results.<sup>86</sup> Under the plaintiff's theory, an employee who was discharged before he began work would be able to collect compensation for his reliance, but an employee who worked for just a single day before being discharged would be unable to collect.<sup>87</sup> The court concluded that the plaintiff's theory was just another "attempt to 'outflank' the employment at will doctrine" and it would result in "no mutuality of obligation

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75. *Id.* at 883.

76. *Id.*

77. *Id.* at 883-84 (citations omitted).

78. *Id.*

79. 761 S.W.2d 670 (Mo. Ct. App. 1988).

80. *Id.* at 671.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 672.

87. *Id.*

in that employers would be held liable for their promises while “[t]he employee may quit any time or never start performance and suffer no liability.”<sup>88</sup>

Like the Eastern District, the Western District has also rejected “fraud-like” claims brought by plaintiffs attempting to skirt the employment at-will doctrine. In *Faust v. Ryder Commercial Leasing*,<sup>89</sup> the plaintiff alleged a claim for intentional and negligent misrepresentation.<sup>90</sup> The plaintiff assisted one of Ryder’s auditors with an investigation of its Lenexa, Kansas office only after the auditor promised that the plaintiff would get his old job at Ryder back after the investigation.<sup>91</sup> However, at the end of the audit, the plaintiff was not hired back.<sup>92</sup> The Western District, like the Eastern District in *Rosatone*, held that the plaintiff could not “rely” on representations that he would be hired as an at-will employee and could not use misrepresentation to “outflank the employment at-will doctrine.”<sup>93</sup>

Missouri appellate courts have, however, recognized one narrow exception to the employment at-will doctrine’s absolute bar on wrongful termination actions. In some limited circumstances, Missouri courts have allowed former employees to maintain a tort action for wrongful termination.<sup>94</sup> A tort action for wrongful termination only lies if the employee was fired for a reason that clearly violates public policy.<sup>95</sup> As the Western District has explained, “[a]lthough employers generally are free to discharge at-will employees with or without cause at any time, they are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy.”<sup>96</sup> Public policy, as understood by Missouri courts, is limited to clear expressions in the state constitution, statutes, or governmental regulations.<sup>97</sup> Discharged employees can only maintain an action against their former employers if they are fired for refusing to violate public policy or for reporting their employer’s violations to the government.<sup>98</sup> Because such an action for wrongful termination arises as a tort, it escapes the prohibitions of the employment at-will doctrine.

Although Missouri state courts may not have previously addressed the exact question presented in *O’Neal*, the Eighth Circuit has applied Missouri law to the question whether a discharged at-will employee can sue her employer for fraud

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88. *Id.* at 673 (quoting *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639, 644 (Mo. Ct. App. 1961)).

89. 954 S.W.2d 383 (Mo. Ct. App. 1997).

90. *Id.* at 393.

91. *Id.* at 386.

92. *Id.*

93. *Id.* at 393.

94. *See Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985).

95. *Id.*

96. *Id.*

97. *Id.* at 878.

98. *Id.*

related to their employment agreement on at least two different occasions. The Eighth Circuit first looked at the question in *Bernoudy v. Dura-Bond Concrete Restoration, Inc.*<sup>99</sup> As the Eighth Circuit understood Missouri law, "an at-will employee may not bring a wrongful discharge action sounding in tort, unless the duty breached is exclusively incidental to the contract."<sup>100</sup> The plaintiffs alleged that Dura-Bond made false statements to them promising that the plaintiffs would have jobs with Dura-Bond after the plaintiffs sold their own company to Dura-Bond's owners.<sup>101</sup> The court held that the plaintiffs had made a submissible case of fraud because the claim did not arise out of the employment contract but arose "out of the negotiations prior to the employment agreement."<sup>102</sup>

In *Paul v. Farmland Industries, Inc.*,<sup>103</sup> the Eighth Circuit once again looked at fraud arising out of an employment relationship and this time reached the opposite result.<sup>104</sup> The court held that Paul failed to prove a submissible case of fraud under Missouri law.<sup>105</sup> The plaintiff claimed that he had been fraudulently induced by Farmland into quitting his previous job based on statements made by Farmland's president that his new employment with Farmland would be for a term of three years.<sup>106</sup> The court found that Paul's claim was essentially a cloaked contract claim, forbidden under Missouri law by *Hanrahan*.<sup>107</sup> Unlike the situation in *Bernoudy*, the claim arose from statements that were themselves part of the contract and not merely incidental to it.<sup>108</sup>

Missouri courts are not alone in having wrestled with questions of fraud and the employment at-will doctrine. Other jurisdictions generally allow plaintiffs to recover from their prospective employers using a fraud claim if they can show both a misrepresentation separate from their employment contract and reliance on that representation.<sup>109</sup> New York's employment at-will doctrine, which is

99. 828 F.2d 1316 (8th Cir. 1987).

100. *Id.* at 1318 (quoting *Deschler v. Brown & Williamson Tobacco Co.*, 797 F.2d 695, 697 (8th Cir. 1986)).

101. *Id.* at 1317.

102. *Id.* at 1318.

103. 37 F.3d 1274 (8th Cir. 1994).

104. *Id.* at 1276.

105. *Id.*

106. *Id.*

107. *Id.* For a more detailed discussion of the court's decision in *Hanrahan*, see *supra* notes 74-78 and accompanying text.

108. *Paul*, 37 F.3d at 1276.

109. See generally *Stewart v. Jackson & Nash*, 976 F.2d 86 (2d Cir. 1992) (holding that terminated lawyer could maintain an action for fraud based on her leaving her previous firm because of employer's lies that she would head its environmental law division and that it already had a large client for that division); *Kidder v. AmSouth Bank, N.A.*, 639 So. 2d 1361 (Ala. 1994) (holding that terminated bank vice-president could maintain an action for fraud based on misrepresentations about what her working

substantially similar to Missouri's, has been applied by the Second Circuit to allow a fired lawyer to maintain an action against her former firm. In *Stewart v. Jackson & Nash*,<sup>110</sup> the attorney joined the defendant law firm after some of its partners promised that she would become head of its environmental law division and that the firm already had a client with a large volume of environmental business.<sup>111</sup> After quitting her previous job as an environmental lawyer and working for the firm for over a year on general litigation matters, the plaintiff was terminated because the major environmental client and resultant work never materialized.<sup>112</sup> The defendants tried to defeat the plaintiff's claim based on an earlier New York state case which, like *Dake*, held that employees at-will "can neither challenge their termination in a contract action nor 'bootstrap' themselves around this bar by alleging that the firing was in some way tortious."<sup>113</sup> The Second Circuit found the case distinguishable because the plaintiff's claim arose from events that occurred well before her termination and were, in many ways, unconnected with her termination.<sup>114</sup> Because the plaintiff's claim was not directly based on the employment contract and actually

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conditions would be in her new position); *Interstate Freeway Servs., Inc. v. Houser*, 835 S.W.2d 872 (Ark. 1992) (allowing discharged at-will employee to maintain an action for fraudulent inducement to enter into the employment relationship); *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464 (Ky. 1999) (allowing pilot to maintain action for fraud based on company's promise at meeting attended by over fifty other pilots that they would get jobs with UPS); *Mueller v. Union Pac. R.R.*, 371 N.W.2d 732 (Neb. 1985) (allowing former at-will employee to maintain action for fraud based on representations from the company that he would not be terminated); *Liggett Group, Inc. v. Sunas*, 437 S.E.2d 674 (N.C. Ct. App. 1993) (holding that employment at-will doctrine does not bar a fraud claim that arises from misrepresentations used to induce plaintiff to enter into the agreement); *Albrant v. Sterling Furniture Co.*, 736 P.2d 201 (Or. Ct. App. 1987) (holding that the fact employee was offered an at-will position did not preclude employee from bringing a cause of action for fraudulent misrepresentation of the terms of her employment); *Dede v. Rushmore Nat'l Life Ins. Co.*, 470 N.W.2d 256 (S.D. 1991) (allowing plaintiff to maintain cause of action for fraud where employer promised to rehire employee if employee agreed to mandatory retirement at age sixty-two and moved to Las Vegas, Nevada); *Trimble v. Wash. State Univ.*, 993 P.2d 259 (Wash. 2000) (holding, on other grounds, that statements to professor did not rise to the level of fraud, but acknowledging that at-will employees are not precluded by the employment at-will doctrine from maintaining a cause of action for fraud). *But cf.* *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43 (Iowa 1999) (holding that an action for negligent misrepresentation cannot arise from negotiations about an employment contract because of the inherently adversarial nature of the employment relationship).

110. 976 F.2d 86 (2d Cir. 1992).

111. *Id.* at 87.

112. *Id.* at 87-88.

113. *Id.* at 88.

114. *Id.*

arose before the contract was formed, the employment at-will doctrine had no application to the plaintiff's situation.<sup>115</sup>

The Arkansas Supreme Court has also allowed a former employee to maintain an action for fraud against his employer when he was fired after just two weeks on the job. In *Interstate Freeway Services, Inc. v. Houser*,<sup>116</sup> the plaintiff, who was the former manager of a diner, was able to prove at trial that the diner's owners had never intended for him to operate the restaurant; all they really wanted the plaintiff to do was clean and prepare the restaurant for opening.<sup>117</sup> Even though the plaintiff's claim in this case *arose solely from the employment contract itself*, the court allowed the plaintiff to avoid the employment at-will doctrine and collect under fraud.<sup>118</sup>

In *Interstate Freeway Services*, one member of the court, Justice Dudley, dissented from the majority opinion and attacked it "as standing for the proposition that now, when an employer hires an employee at-will, but intends to later replace him with someone else, the employer can be liable for the tort of deceit."<sup>119</sup> The decision, according to Justice Dudley, eviscerates the long held employment at-will doctrine and goes against the core of the doctrine's rationale.<sup>120</sup> The heart of the employment at-will doctrine, according to Justice Dudley, is that the employment relationship's obligations must be mutual for a specified term.<sup>121</sup> The relationship obligations are mutual because:

If the employee does not agree to work a specified length of time, the employer is not obligated to employ him for any specified length of time. If the employer does not agree to employ the employee for a specified length of time, the employee is free to leave at any time.<sup>122</sup>

The dissent argued that the court's holding destroys this logic by making the employee free to leave at any time but requires the employer to continue the relationship.<sup>123</sup> Justice Dudley also pointed out that the tort of deceit also requires mutuality.<sup>124</sup> Thus, "[u]nder the precedent of the majority opinion, if an employee takes a job and inquires about vacations, insurance, and future business expectations, but has a hidden intent to take a better job when it comes along, as most employees do, he too will be subject to suit for the tort of

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115. *Id.*

116. 835 S.W.2d 872 (Ark. 1992).

117. *Id.* at 874.

118. *Id.*

119. *Id.* at 876 (Dudley, J., dissenting).

120. *Id.* at 876-77.

121. *Id.* at 877.

122. *Id.*

123. *Id.*

124. *Id.* at 879.

deceit.”<sup>125</sup> Employees would therefore face the possibility of being held liable for money damages to their former employers anytime they decide to find a new job.<sup>126</sup>

#### IV. INSTANT DECISION

In *O’Neal*, the Missouri Court of Appeals for the Eastern District of Missouri held that an employee can maintain an action for fraud against his former employer so long as the events that he relies upon for the claim are separate from any breach of contract claim that he would have but for the employment at-will doctrine.<sup>127</sup> The court based its decision that *O’Neal’s* claim was not barred by the employment at-will doctrine on three cases: *Bernoudy*, *Paul*, and *Hanrahan*.<sup>128</sup> First, the court recognized from *Bernoudy* that “a fraud claim is permitted only if it arises from acts that are separate and distinct from the contract.”<sup>129</sup> According to the court, there is a close analogy between the facts of the *Bernoudy* case and the situation in *O’Neal*.<sup>130</sup> In *Bernoudy*, the court noted, the fraud claim arose from statements made during the negotiations regarding the nature of the plaintiff’s employment.<sup>131</sup> Here, the court noted, *O’Neal’s* fraud claims grew out of *O’Neal’s* negotiations prior to employment.<sup>132</sup>

Next, the court turned to *Hanrahan* and *Paul* to quickly dismiss the assertion that either case governed the situation in *O’Neal*.<sup>133</sup> The court concluded that *Hanrahan* was distinguishable from *O’Neal* because it dealt with a claim for wrongful discharge and *O’Neal* dealt with a claim for fraudulent misrepresentation in employment negotiations.<sup>134</sup> The court then distinguished the Eighth Circuit’s decision in *Paul* because the plaintiff in *Paul* also failed to present a submissible case of fraud on its own elements.<sup>135</sup>

After failing to find that the employment at-will doctrine blocked *O’Neal’s* claim, the court then looked to see if he sufficiently pled a submissible case of fraud.<sup>136</sup> The court noted that the elements of fraud include:

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125. *Id.*

126. *Id.*

127. *O’Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 703 (Mo. Ct. App. 1999).

128. *Id.* at 702. For a discussion of these three cases, see *supra* notes 74-78, 99-108 and accompanying text.

129. *O’Neal*, 996 S.W.2d at 702.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 702-03.

135. *Id.* at 703.

136. *Id.*



(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of the truth; (5) the speaker's intent that the representation be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.<sup>137</sup>

The plaintiff met this burden, in part, by alleging that one of Stifel's employees had promised him that he would become an employee of the company and that he relied on this promise to his detriment by hiring an assistant and beginning the process of transferring clients to his new employer, Stifel.<sup>138</sup> The court thus concluded that O'Neal had met his burden and remanded the case for a full trial on the merits.<sup>139</sup>

## V. COMMENT

The Missouri Court of Appeals for the Eastern District of Missouri should have sustained the trial court's ruling. O'Neal's claim, which arose out of an employment contract with an indefinite duration, should have been barred by the employment at-will doctrine. The court's opinion can be questioned on at least two points. First, the decision is outside the limits previously set by Missouri courts. Second, the decision is questionable when compared to the decisions of other jurisdictions.

*Bernoudy*, the main case the court cites in support of its holding, presents a factually different situation from the one presented in *O'Neal*. In *Bernoudy*, the plaintiffs had a full-scale employment contract with numerous terms.<sup>140</sup> The plaintiffs in *Bernoudy* alleged that prior to the time that they accepted Dura-Bond's offer and formed an employment contract with Dura-Bond, they had been lied to by the company's representatives so as to induce them to *enter into* the contract.<sup>141</sup> In *O'Neal*, the plaintiff and Stifel's employee were in the process of creating the terms of a contract at the time one of Stifel's employees told him the company was definitely going to employ him.<sup>142</sup> In fact, the alleged misrepresentations were the very same statements O'Neal used as the basis for his breach of contract claim, which was barred by the employment at-will

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137. *Id.* (citing *City of Wellston v. Jackson*, 965 S.W.2d 867, 870 (Mo. Ct. App. 1998)).

138. *Id.* at 701, 703.

139. *Id.* at 704.

140. *See Bernoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1317 (8th Cir. 1987).

141. *Id.*

142. *See O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 701 (Mo. Ct. App. 1999).

doctrine.<sup>143</sup> This difference is far from trivial. As the *O'Neal* court admits, the key to the *Bernoudy* decision is that a fraud claim is only permitted when it arises from acts that are "separate and distinct from the contract."<sup>144</sup> In *O'Neal*, the allegedly fraudulent acts were not separate and distinct from the contract. Rather, the acts were the contract.<sup>145</sup> In other words, the one case the court claims supports its holding actually requires the court to dismiss *O'Neal's* fraud claim.

Even if the court's reading of *Bernoudy* is correct, its argument lacks binding force. *Bernoudy* is an Eighth Circuit case applying Missouri law. As such, its authority in Missouri state courts is merely *persuasive*, and it technically cannot require Missouri's state courts to reach any particular decision. If Missouri law is contrary to it, state law precedents should control. In *O'Neal*, the court quickly dismisses its own precedent in favor of a federal case.<sup>146</sup> The court chooses to ignore *Hanrahan* even though its facts are very similar to the situation in *O'Neal*.<sup>147</sup>

In *Hanrahan*, the Eastern District recognized that Missouri is committed to the continuing validity of the employment at-will doctrine.<sup>148</sup> The doctrine requires that any tort claim, including fraud, that rests on the same grounds as a precluded wrongful discharge claim must likewise be barred.<sup>149</sup> Because *O'Neal's* claim arises from the exact same facts as his breach of contract claim, it falls under *Hanrahan's* prohibition.<sup>150</sup> The *O'Neal* court's reasoning that *Hanrahan* is distinguishable is questionable.<sup>151</sup> Count III of the plaintiff's petition in *Hanrahan*, like count II in *O'Neal's* petition, asserts a claim for fraud.<sup>152</sup> Both cases similarly allege fraud claims that arise from the same events as their causes of action, and therefore should be barred by the employment at-will doctrine.

*O'Neal's* holding is in conflict with the majority of Missouri's employment at-will case law. As stated earlier, the Missouri Supreme Court's decision in *Dake* can be seen as standing for the proposition that there is no cause of action for wrongful discharge or breach of contract in the employment at-will context, even if the suit is "cloaked" in tort law claims.<sup>153</sup> In subsequent cases like *Faust*

143. *Id.*

144. *Id.* at 702.

145. *Id.* at 701.

146. *Id.* at 703.

147. *Id.*; see *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 880-81 (Mo. Ct. App. 1988).

148. See *Hanrahan*, 752 S.W.2d at 883-84.

149. *Id.*

150. See *O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 701-02 (Mo. Ct. App. 1999).

151. *Id.* at 702-03.

152. See *Hanrahan*, 752 S.W.2d at 882.

153. See *Dake v. Tuell*, 687 S.W.2d 191, 192 (Mo. 1985); see also *Faust v. Ryder*

and *Rosatone*, the Missouri courts of appeals have uniformly applied the employment at-will doctrine to prevent plaintiffs from making claims of fraud or reliance based on the same facts as a prohibited breach of contract or wrongful discharge claim.<sup>154</sup> Therefore, the Eastern District's decision in *O'Neal* is probably in conflict with the Western District's decision in *Faust*, creating a difficult situation for employment lawyers arguing before any division of the court of appeals.<sup>155</sup> Even if these cases do not expressly conflict with the holding in *O'Neal*, they should be examined and persuasively distinguished before the court's holding in *O'Neal* can be relied on.

*O'Neal's* holding seems inconsistent with jurisdictions outside of Missouri as well. The Second Circuit's opinion in *Stewart* is predicated, like *Bernoudy*, on the fact that the fraud claim must arise from events that are completely separate from the employment contract.<sup>156</sup> In *O'Neal*, the underlying events are the same for both the breach of contract claim and the fraud claim.<sup>157</sup> The Arkansas Supreme Court's opinion does provide some support for the *O'Neal* holding.<sup>158</sup> Yet, the Arkansas court's opinion in *Interstate Freeway Services* was heavily criticized by Justice Dudley in dissent. As Justice Dudley pointed out, the majority failed to analyze the facts of the case using the employment at-will doctrine and failed to give more than a passing glance to the potential impact this decision could have on the employment at-will doctrine.<sup>159</sup>

The Arkansas Supreme Court also failed to deal with the problem that its decision creates in opening up employees to fraud claims brought by their employers for taking a better job.<sup>160</sup> Although there has been no reported case of an employer suing a former employee for fraud when she takes another job, it is theoretically possible.<sup>161</sup> Such a result could have a chilling effect on the

Commercial Leasing, 954 S.W.2d 383, 393-94 (Mo. Ct. App. 1997).

154. See *Faust*, 954 S.W.2d at 393-94; *Rosatone v. GTE Sprint Communications*, 761 S.W.2d 670, 673 (Mo. Ct. App. 1988).

155. See *Faust*, 954 S.W.2d at 393-94.

156. See *Stewart v. Jackson & Nash*, 976 F.2d 86, 88 (2d Cir. 1992).

157. See *O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 701-02 (Mo. Ct. App. 1999).

158. See *Interstate Freeway Servs., Inc. v. Houser*, 835 S.W.2d 872, 874 (Ark. 1992).

159. *Id.* at 877.

160. *Id.* at 879.

161. A former employer could meet the elements of fraudulent misrepresentation in many situations. For example, a medium size law firm hires a young associate fresh out of law school to work in its practice. The firm places a premium on long-term relationships and intends that every associate it hires will eventually become a partner in the firm. The partners make a point of asking every prospective associate they interview if she intends to stay in the area for the rest of her career and eventually become a partner in the firm, contributing to its vitality. Only candidates who affirmatively state that this is their intention are hired. The partners spend time with the associate, telling her how to improve her work and developing her skills as an attorney.

American labor market. In robust economic times, tight labor markets already cause employers to take drastic steps to hire new employees or retain current workers.<sup>162</sup> As recent non-compete clause litigation shows, employers are not adverse to using the legal system to prevent employees, even in low-paying positions, from working for a competitor.<sup>163</sup> An employer conceivably could sue a former employee for fraud in an attempt to “make an example of her” to other employees, or to prevent the employee from working in or starting a competing business. Because of the great disparity in resources between most workers and their employers, the threat or possibility of a suit could present a major obstacle to employees who want to leave their present employers.

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The partners also give her significant client responsibility and introduce her to the firm’s most important clients. After five years, the associate leaves the firm and opens her own office right down the street, taking some of the firm’s best clients with her. In a newspaper article about the opening of her new practice the former associate states that it has always been her dream to have her own firm and that she went to work with her old firm solely to “learn the ropes,” save enough money, and develop a client base to strike out on her own. Under the logic of *O’Neal* and the Arkansas Supreme Court in *Interstate Freeway Services*, the law firm would have a cause of action against the attorney for fraudulent misrepresentation.

162. See *Workers See The Biggest Jump in Wages and Benefits in 10 Years*, ST. LOUIS POST-DISPATCH, Apr. 28, 2000, at C8. A shortage of workers has already caused companies in some industries to take drastic steps. For example, in the Oklahoma oil fields, experienced workers are so hard to find that one company sends a representative to the state prison every time a group of parolees is released to try to recruit employees. See Renee Ruble, *The Oil Industry’s Conundrum: There’s Nobody to Do the Work*, ST. LOUIS POST-DISPATCH, May 30, 2000, at C6.

163. See *Renal Treatment Ctrs.-Missouri, Inc. v. Braxton*, M.D., 945 S.W.2d 557, 564-65 (Mo. Ct. App. 1997) (employer tried to enforce non-compete covenant against doctor even though employer had no protectable interest in doctor’s contacts with patients); *West Group Broad., Ltd. v. Bell*, 942 S.W.2d 934, 941 (Mo. Ct. App. 1997) (Crow, J., dissenting) (employer tried to enforce restrictive covenant against radio station employee paid six dollars an hour); *Shelbina Veterinary Clinic v. Holthaus*, 892 S.W.2d 803, 804 (Mo. Ct. App. 1995) (employer attempted to enforce non-compete agreement prohibiting veterinarian from practicing within thirty-five miles of city for four years when consideration for the agreement was only five hundred dollars).

## VI. CONCLUSION

The *O'Neal* decision creates a new way for discharged employees to dance around the employment at-will doctrine and receive compensation for their injuries. Yet, this opportunity may be short lived because the court's decision may be in conflict with other Missouri district appellate courts and previous Missouri case law. The court in *O'Neal* adds another layer to the complexities of employment law and, in so doing, possibly goes against the very foundations of Missouri's understanding of employment at-will.

JAMES E. MEADOWS